

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600**

Case No. A-6044

PETITION OF AVIVA MORDEHAI
(Hearing held January 19, 2005)

OPINION OF THE BOARD

(Effective date of Opinion, March 9, 2005)

This proceeding is a petition pursuant to Section 59-A-4.41 of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(b)(2). The petitioner proposes the construction of a one-story addition that requires a 5.79 foot variance as it is within 19.21 feet of the rear lot line. The required setback is twenty-five (25) feet.

Patrick O'Neil, Esquire, Steven A. Robins, Esquire, Allen Neyman of NSA Architects and Rabbi Hertzels Kranz appeared with the petitioner at the public hearing.

The subject property is Lot 9, Block B, Mill Farms Subdivision, located at 928 Clintwood Drive, Silver Spring, Maryland, 20902, in the R-60 Zone (Tax Account No. 1301415645).

Decision of the Board: Requested variance **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner testified that she seeks a variance to construct a 5.8 x 14.10 foot one-story addition. The petitioner's oldest son Shauli, now age fourteen, as been in a comma since suffering a near-drowning accident that occurred when he was almost two years old. See, Exhibit No. 3(j) [letter from Jeffrey P. Bernstein, M.D.]. Dr. Bernstein's letter states that Shauli suffers from a severe neurological injury and is not able to perform life functions for himself and needs constant care and attendance. See, Exhibit Nos. 3(b) and 3(c) [photographs].
2. The petitioner testified that her son is on life-support and must be washed, fed and moved by someone else. The petitioner testified that she receives help caring for Shauli from volunteers at the local high school and nursing care assistance from the State, but that she is her son's main caregiver.

3. The petitioner testified that the current space that is used for the care of her son is a converted family room and that the space is immediately off the front door of the house. The petitioner testified that Shauli's main care is preventive because his immune system is very weak and that if he catches a virus or pneumonia it would be life-threatening for him.
4. The petitioner testified that all of the house's bathing areas are on the second floor. She is required to carry Shauli up and down stairs daily for his bath. When Shauli was a small child, this was not difficult, but he is now a growing teenager and his weight, combined with occasional involuntary motions, can throw her off balance. She fears that this circumstance of Shauli's care is becoming hazardous. If Shauli has a seizure or experiences some other event requiring immediate attention during his bath, he must be carried quickly down the stairs to where his medical equipment is located. The petitioner and Mr. Neyman testified that the addition has been designed to accommodate all needs necessary for Shauli's care, particularly bathing, within a single area.
5. The petitioner testified that a lot of disposable medical supplies are used in the care of her son, including pads, catheters, suctioning devices and syringes, and that she receives numerous deliveries of these supplies. The petitioner testified that all deliveries are made through the front door of the residence and that the house does not have a handicap accessible entrance. The proposed addition would provide a handicap accessible entrance. The petitioner testified that the addition would provide a compact and completely contained area for the care of her son.
6. Mr. Neyman testified that the proposed addition will provide a handicap accessible entrance for visitors and the wheelchair-type stroller Shauli uses. Mr. Neyman testified that the proposed addition will contain a bathroom, a shower, a laundry area with a washer and dryer, a clean-up sink, and storage for an array of clinical/medical accoutrements and supplies. See, Exhibit 14 [dimensioned floor plan].
7. Mr. Neyman testified that the dimensions of the proposed addition will be smaller than the existing space currently used for Shauli. Mr. Neyman testified that the petitioner's lot is 9,000 square feet and that the proposed addition will result in an encroachment into the setback of 90 square feet.

8. Rabbi Kranz testified that he is a neighbor of the petitioner and that the child would not be alive if he was in an institution and that the proposed construction is being paid for by a private benefactor.

STANDARDS FOR EVALUATION

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variance can be granted as a reasonable accommodation of the petitioner's son's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. § 3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to

afford people with disabilities the same opportunity to housing as those who are without disabilities.” [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an “activity” of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would “fundamentally alter or subvert the purposes” of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

FINDINGS OF THE BOARD

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant’s medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The Board finds that the need for assistance with all manner of life-support demonstrates that the petitioner’s son’s major life activities are severely restricted as the result of a physical disability within the meaning of the ADA and FHAA. The Board finds that the proposed construction of a one-story addition would permit the petitioner’s son a necessary and functional nursing and treatment space and

constitutes a reasonable modification of a government program (here, the zoning ordinance) to permit the life-support essential for her child's care.

2. The Board finds that the total square footage of the proposed one-story addition is de minimis and will not undermine the intent of the zoning ordinance.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the testimony of her witnesses and representations of her attorneys, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioner's child's disability because (1) the proposed construction is necessary to permit the petitioner's son's life-support functions, and (2) it will not fundamentally alter or subvert the purposes of the zoning ordinance.

Accordingly, the requested variance of 5.79 feet from the required twenty-five (25) foot rear lot line setback for the construction of a one-story addition is **granted** subject to the following conditions:

1. The petitioner shall be bound by all of her testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 3(k) through 3(x) and 4(a) through 4(d).

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Board member Angelo M. Caputo was necessarily absent and did not participate in this Resolution. On a motion by Louise L. Mayer, seconded by Donna L. Barron, with Wendell M. Holloway and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing
Opinion was officially entered in the
Opinion Book of the County Board of
Appeals this 9th day of March, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.